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Special Issue: Introduction to the Law and Markets: Regulating Controversial Exchange
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Article 1

Introduction to the Law and Markets: Regulating Controversial Exchange

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Introduction to the Law and Markets: Regulating Controversial Exchange

Abstract
We are pleased to share these articles, written by selected scholars who presented at a symposium held at Osgoode Hall Law School on September 15, 2015. With the support of the Pierre Genest Memorial Fund, the Nathanson Centre on Transactional Human Rights, Crime and Security, and the Institute for Feminist Legal Studies, our objective at the symposium was to address pressing contemporary issues including access to reproductive technologies, sex work, evolving notions of sovereignty, and the refugee crisis. We explored the power and limits of market forces and regulatory tools for addressing these issues, while stimulating lively and respectful discussion that contemplated possible responses to these pressing social issues. Eighteen scholars engaged on a variety of topics that cut across constitutional law, criminal law, immigration and refugee law, sexuality and the law, and business law.

Special Issue of the Osgoode Hall Law Journal

Special Issue: Introduction to the Law and Markets: Regulating Controversial Exchange

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WE ARE PLEASED TO SHARE THESE ARTICLES, written by selected scholars who presented at a symposium held at Osgoode Hall Law School on September 15, 2015.[1] With the support of the Pierre Genest Memorial Fund, the Nathanson Centre on Transactional Human Rights, Crime and Security, and the Institute for Feminist Legal Studies, our objective at the symposium was to address pressing contemporary issues including access to reproductive technologies, sex work, evolving notions of sovereignty, and the refugee crisis. We explored the power and limits of market forces and regulatory tools for addressing these issues, while stimulating lively and respectful discussion that contemplated possible responses to these pressing social issues. Eighteen scholars engaged on a variety of topics that cut across constitutional law, criminal law, immigration and refugee law, sexuality and the law, and business law.

Our interest in the symposium was sparked by an analysis of free market exchange. Within market-based economies, parties are generally free to exchange goods and services as they choose. Freedom of contract is a guiding principle,

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1. Osgoode Hall Law School Symposium: Law and Market: Regulating Controversial Exchange, Toronto, Osgoode Hall Law School, 15 September 2015 [Symposium].

though an exchange may be regulated to protect consumers, promote competition, and collect taxes. There are certain goods and services, however, that governments either prohibit from trade or regulate to such an extent that makes it clear that those exchanges are disfavored. Within Canada, human biological material, sexual services, sovereignty, and refugees fall into this category of disfavoured exchange. States use an arsenal of tools, from refusal to enforce such contracts to armed intervention, to prevent these markets from flourishing. Think of sex. Most states either prohibit or heavily regulate the exchange of sex for monetary compensation (often with the justification that they are doing it to "protect" people from their bad choices). Yet, the same exchange, when done for free, is largely a matter of private choice. A similar dynamic can be observed with the exchange of human organs for transplantation. In most countries (including Canada and the United States), for example, two biologically incompatible pairs can engage in a swap in which the donor from Pair A donates to the recipient in Pair B and vice versa. But it is illegal to swap the same kidney among the same set of people in exchange for money. In other words, kidney barter, but not kidney sale, is permitted. What explains the different treatment of these very similar transactions? Why does the presence or absence of a profit motive dictate the legal treatment of certain exchanges? We are not, of course, the first ones to ask these questions. Scholars from a wide range of disciplines such as Alvin Roth, Viviana Zelizer, Gary Becker, Peggy Radin, Richard Posner, Kieran Healy, James Boyle and others have engaged these questions for years, without reaching consensus. In this symposium, we seek to build on and push their work further.[2]

Prohibiting exchange can have unintended harmful consequences. For instance, the use of the blunt instrument of the criminal law to suppress markets in sexual services forces sex workers underground and into unsafe working environments. Similarly, the refusal to consider exchanging control over a separatist region for financial compensation can result in violence, to the detriment of both the region itself and the state to which it belongs. These significant harms call into question the role that morals should play in the decision to restrict a market. The symposium out of which this special issue was born aimed to critically analyze the concerns surrounding controversial markets, the strengths and limitations of market allocation and regulation as an alternative for addressing them.

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2. See *e.g.* Alvin E Roth, "Repugnance as a Constraint on Markets" (2007) 21:3 J Econ Persp 37; Elisabeth Landes & Richard A Posner, "The Economics of the Baby Shortage" (1978) 7 J Legal Stud 323; Viviana A Zelizer, *The Purchase of Intimacy* (Princeton: Princeton University Press, 2005); Kieran Healy & Kimberly D Krawiec, "Repugnance Management and Transactions in the Body" 107:5 Amer Econ Rev: Papers and Proceedings 86.

This special issue starts with an essay comparing contractualization and commodification in the context of babyselling—the purchasing of adoption—to show the complexity and dilemmas of arguments about commodification. In "From Babyselling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market,"[3] Margaret Jane Radin takes up the issue of commodification, questioning what things, relationships or attributes should not be subject to monetization and trade. Radin, whose work on the proper boundaries of the marketplace is rightly considered foundational, examines the issue of contractualization, focusing on a situation existing in the contemporary United States, in which mass-market fine-print "contracts" are waiving recipients' legal rights, especially to redress grievances. Radin elegantly makes the move showing how the legal fiction of a "bargained for exchange" simply does not exist in the context of most boilerplate rights waivers. Radin argues for market-inalienability—that is to say, there are some rights that should be permanently in the care of the polity, and that individuals should not be able to waive, even with consent, at least not on a mass-market basis. Radin then proposes to replace the use of contract doctrines with a better regime with which society might develop limits to the extremes of fine-print rights deletion by firms.

Building on the controversy of exchange in human biological material, Nicola Lacetera surveys the existing literature in economics and moral philosophy on this topic, discussing how an understanding of the ways in which people analyze efficiency and morality tradeoffs in the context of these contested exchanges is important to understanding, and possibly reformulating, public policy. In "Incentives, Ethics, and the Economics of Body Parts,"[4] Lacetera lays out recent research showing that properly devised economic incentives increase the supply of blood without hampering its safety; similar effects may be possible for other body parts, such as bone marrow and organs as well. These positive effects alone, however, do not justify the introduction of payments for supplying body parts, when these activities concern contested commodities or repugnant transactions. When transactions concern contested commodities, societies often face trade-offs between the efficiency effects of trades mediated by a monetary price, and the moral opposition to the provision of these payments. Lacetera describes and discusses the current debate on the role of moral repugnance and concerns surrounding monetary payments for body parts, with a focus on markets for organs, tissues, blood, and plasma. He concludes with a discussion of recent

3. (2017) 54:2 Osgoode Hall LJ 339
4. (2017) 54:2 Osgoode Hall LJ 397

research focused on understanding the trade-offs that individuals face when forming their opinions about how a society should organize these transactions.

The special issue then transitions from the individual to the corporate setting, with a discussion of controversies arising from the emergence of "wolf packs," which are loose networks of parallel-minded shareholders (typically hedge funds) that act together to effect change in a given corporation without disclosing their collective interest. Wolf packs are able to circumvent disclosure rules generally applied to shareholders that act together by deliberately avoiding being characterized as a "group" for the purposes of United States securities law or as acting jointly or in concert for the purposes of Canadian securities laws. Building on the theme of controversial markets, Anita Anand and Andrew Mihalik probe the role of wolf packs in Canadian corporate governance and particularly in change of control transactions in their paper, "Coordination and Monitoring in Changes of Control: The Controversial Role of 'Wolf Packs' in Capital Markets."[5] Changes of control, especially in the hostile bid context, are controversial given that the target company's board may have differing views on the best interests of the company and its strategic objectives. This paper provides an overview of the theoretical and empirical literature and seeks to make the case for a broader application of the early warning regime.

Following the controversy of control as an exchanged element in commodification, Dania Thomas provides a critical analysis of the infamous *pari passu* litigation in the courts of New York over Argentina's mammoth default on its sovereign debt a decade and a half ago.[6] That litigation, Thomas argues, exposed the dangers of entrusting common law courts with the impossible role of enforcing contracts in the ad hoc "non-system" that currently exists to resolve sovereign insolvency. In "Sovereign Debt as a Commodity: A Contract Law Perspective,"[7] Thomas works on identifying the unintended consequences of judicial intervention in this context. In seeking to fulfill their enforcement role, Thomas argues, the courts have dismantled common law checks and balances, gone beyond precedent, and devised remedies on an interpretation that defied market convention. Thomas argues that the challenges the courts face negotiating this "non-system" require them to play an inadvertent expansive "regulatory"

5. (2017) 54:2 Osgoode Hall LJ 377
6. The litigation at the heart of Thomas' analysis goes under the caption *NML Capital v Republic of Argentina*. For additional detail, see Lee C Buchheit & Mitu Gulati, "Restructuring Sovereign Debt after NML v. Argentina" (2017) Cap Mkts LJ [forthcoming in 2017]. Draft available online, at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6342&context=faculty_scholarship>.
7. (2017) 54:2 Osgoode Hall LJ 418

role. An unintended consequence of this expansive role is sustaining the legal fiction that sovereign debt is a commodity. To enforce contracts, judges must now ensure that creditors enjoy their property (debt) without constraints and assume away the externalities that arise from their unlimited enjoyment. Thomas then discusses the wider ramifications of this legal fiction and the possibility that this may be influencing the resistance of the official sector in the Eurozone and elsewhere to countenance debt workouts. She questions the idea that the possibility of enforcement in this instance indicates that we are closer to achieving *the* legal regime theorized as the neutral backdrop of competitive markets.

The special issue concludes with a dialogue between Mitu Gulati and Joseph Blocher, on the one hand, and Karen Knop, on the other, on the topic of commodifying sovereignty. The conversation begins with Gulati and Blocher in their paper "Markets and Sovereignty,"[8] asking whether sovereign territory, like property, could be traded among countries while still respecting people's interest in self-determination. Across the world, they claim, many regions are located in the wrong nations–wrong in the sense that the people of these regions believe they would be safer, happier, and wealthier if surrounded by different borders and governed by different leaders. These people might be able to improve their lot by voting out their current government or by emigrating, but those are imperfect solutions and are often unavailable to those who need them most. Gulati and Blocher ask how international law could help ameliorate the bad government problem by facilitating welfare-enhancing border changes.

Knop, however, views the issue through a different lens. In "A Market for Sovereignty? The Roles of Other States in Self-Determination,"[9] she does not look at commodification as a solution, but as a set-up of the problem of self-determination, inquiring into 'who' becomes legally relevant. Knop's paper draws on a wealth of both historical and contemporary literature on self-determination, in a creative way that critically engages Blocher and Gulati. For international lawyers, the more novel inquiry is prompted by Blocher and Gulati's view of the actors relevant to secession, as distinct from cession, and to self-determination generally. Knop seeks to show that treated as an experiment in framing, Blocher and Gulati's inclusion of other states should provoke a fresh look at self-determination in international law that moves beyond a focus on the so-called parent state and, in cases of violence, on the alternative responses by international institutions. Among constitutional theorists, there is increasing

8. (2017) 54:2 Osgoode Hall LJ 464
9. (2017) 54:2 Osgoode Hall LJ 490

caution about the romance of the idea that individuals single-handedly decide their collective futures.

The Law and Markets special issue built upon the platform provided by the symposium to facilitate further critical analysis and dialogue among scholars on key ethical and legal challenges with which controversial markets are fraught. We hope that this interdisciplinary effort will better inform future debates and decision-making by presenting important considerations for determining the appropriate use of market allocation mechanisms and the extent of regulation for contentious subjects of trade. We hope you enjoy reading this issue as much as we enjoyed putting it together.